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MILLER NASH

ORDER

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49.00 Clark County, WA

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

Landmark Development, LLC

Vancouver, WA

Respondent.

Docket No. CWA-10-2005-0208

ADMINISTRATIVE ORDER ON CONSENT

I. INTRODUCTION

1. This Administrative Order on Consent ("Consent Order" or "Order") is entered into voluntarily by the United States Environmental Protection Agency, Region 10 ("EPA"), and Landmark Development, LLC ("Respondent").

2. This Consent Order directs Respondent to undertake specified measures to offset the adverse environmental impacts and habitat losses occurring in waters of the United States as a result of the unauthorized discharge of fill material by J. Clifford Cook, Jr., and his company, Lacamas Creek Enterprises, Inc., on 1.2 acres of wetlands located adjacent to Burnt Bridge Creek, City of Vancouver, Clark County, Washington, more specifically described in paragraph 12 below.

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3. At the time of the unauthorized discharge, the real property at issue was owned by the Domingo, Agpalza, and Saguilla families (hereafter jointly referred to as "Domingo Group").

II. JURISDICTION

4. EPA issues this Consent Order under the authority vested in its Administrator by Section 309(a) of the Clean Water Act ("Act" or "CWA"), 33 U.S.C. § 1319(a). This authority has been delegated to the Regional Administrator for EPA Region 10 and re-delegated to the Director of the Office of Ecosystems, Tribal and Public Affairs.

5. Respondent agrees not to contest EPA's jurisdiction or authority to enter or enforce this Consent Order. Respondent also agrees not to contest the validity of any terms and conditions of this Consent Order in any action to enforce, or in any action arising from, this Consent Order.

6. EPA's decisions or actions pursuant to this Consent Order are not subject to judicial review prior to the United States' initiation of judicial action to compel Respondent's compliance with this Consent Order.

III. APPLICABILITY

7. This Consent Order shall be binding on Respondent and its partners, agents, employees, attorneys, successors, and assigns, and on all persons, independent contractors, contractors, and consultants acting in concert with Respondent.

8. Respondent shall provide a copy of this Consent Order to all contractors and/or consultants it retains to perform any of the work described in this Consent Order at least forty-eight (48) hours prior to the initiation of such work.

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9. Respondent shall provide a copy of this Consent Order to any successor-in-interest to its control, operation, or any other interest in all or any portion of the real property at issue at least thirty (30) days prior to the transfer, and shall simultaneously notify EPA in writing that such notice has been given. No transfer or contract shall in any way affect Respondent's obligation to comply fully with all the terms and conditions of this Consent Order.

IV. STATEMENT OF PURPOSE

10. The parties enter into this Consent Order to provide a remedy for the environmental and habitat losses caused by J. Clifford Cook, Jr.'s and Lacamas Creek Enterprises, Inc.'s unauthorized discharges of fill material to wetlands adjacent to Burnt Bridge Creek, Washington, more fully described in paragraph 12 below, by implementing the *Wetland Mitigation & Plant Plan for Elk Meadows Proposed Subdivision* dated July 23, 2002, attached to this Consent Order as Attachment 1, as revised in Section VII below. The *Wetland Mitigation & Plant Plan for Elk Meadows Proposed Subdivision* dated July 23, 2002, as revised, is hereinafter referred to as the "Mitigation Plan."

V. FINDINGS OF FACT

11. Respondent is a limited liability company registered in the State of Washington.

12. The wetlands at issue in this action are located in what is currently known as the Elk Meadows Planned Development located at Section 15, Township 2 North, Range 2 East, NE 52nd Street between NE 131st Avenue and 137th Avenue, City of Vancouver, Clark County, Washington. This property is hereinafter referred to as the "Site." The Site is adjacent to Burnt Bridge Creek, a tributary to the Columbia River.

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13. The focus of this Order is the 1.2 acres of filled wetlands in the northwest corner of the Site. The Site also contains wetlands that have not been filled. As part of its permitting process, the U.S. Army Corps of Engineers ("Corps") has determined that these unfilled wetlands are "waters of the United States," as defined in the Clean Water Act. Those portions of the Mitigation Plan which involve the buffer around the unfilled wetlands in the central area of the Site identified in the Mitigation Plan as "Area B" will be addressed by the Corps in its permitting process and are not subject to this Consent Order.

14. On or about August, 1999, and at times more fully known to J. Clifford Cook, Jr., Mr. Cook, Lacamas Creek Enterprises, Inc., and/or their contractor commenced mechanized filling of wetlands at the Site. The activity involved deposition of stockpiled fill material in the wetlands in the northwest corner of the Site, as shown on the map contained in Attachment 2 to this Consent Order.

15. The activities of J. Clifford Cook, Jr. and Lacamas Creek Enterprises, Inc. described in paragraph 14 above resulted in the discharge of dredged and/or fill material to waters of the United States at the Site.

16. J. Clifford Cook, Jr. and Lacamas Creek Enterprises, Inc. did not have a permit under Section 404 of the CWA to discharge dredged and/or fill material into the wetlands in the northwest corner of the Site.

17. On or about June 23, 2003, D.N.J.O., LLC ("DNJO"), purchased the real property located at the Site from the Domingo Group. On June 23, 2005, DNJO and Respondent entered into a purchase and sale agreement for the Site, but title to the property has not yet been

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transferred to Respondent. Because Respondent desired access to the property prior to the date it will acquire title to the property, on July 29, 2005, DNJO and Respondent entered into a license agreement which allows Respondent to conduct the mitigation work described in this Order. A copy of the license agreement is included as Attachment 3 to this Order.

18. Prior to entering into the sale and purchase agreement and the license agreement referenced in the paragraph above, Respondent was aware of EPA's allegations that unauthorized dredged and/or fill material remained on the Site.

VI. CONCLUSIONS OF LAW AND DETERMINATIONS

19. J. Clifford Cook, Jr., is an individual and is the president and owner of Lacamas Creek Enterprises, Inc., a bankrupt corporation. Each is therefore a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

20. The dredged and/or fill materials referenced in Section V above are "pollutants" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

21. The loader/bulldozer/backhoe used by J. Clifford Cook, Jr., Lacamas Creek Enterprises, Inc., and/or persons acting in concert with them, is a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

22. The wetlands in the northwest corner of the Site referenced in Section V above are "waters of the United States" within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and 40 C.F.R. § 232.2.

23. By causing such dredged and/or fill material to enter waters of the United States, J. Clifford Cook, Jr. and Lacamas Creek Enterprises, Inc. engaged in the "discharge of

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pollutants" from a point source within the meaning of Sections 301(a) and 502(12) of the Act,
33 U.S.C. §§ 1311(a) and 1362(12).

24. J. Clifford Cook, Jr. and Lacamas Creek Enterprises, Inc.'s discharges of dredged
material were not authorized by any permit issued pursuant to Section 402 or 404 of the Act,
33 U.S.C. § 1312 or 1314.

25. In discharging pollutants into waters of the United States at the Site without a
permit under the CWA, J. Clifford Cook, Jr. and Lacamas Creek Enterprises, Inc. violated
Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

26. Unauthorized dredged and/or fill material currently remain at the Site.

27. Respondent has agreed to provide mitigation for the adverse impacts of the
unauthorized dredged and/or fill material to the wetlands in the northwest corner of the Site.

VII. WORK TO BE PERFORMED

28. To mitigate for the adverse impacts of the unauthorized discharge of dredged
and/or fill material to the wetlands in the northwest corner of the Site, Respondent has agreed to
create 2.5 acres of wetlands in the northern portion of the Site in an area adjacent to Burnt Bridge
Creek identified in the Mitigation Plan as "Area A" hereinafter referred to as the "Mitigation
Site."

29. The work will be performed in accordance with the Mitigation Plan referenced in
paragraph 10 above. The Mitigation Plan contains the following revisions to the *Wetland
Mitigation & Plant Plan for Elk Meadows Proposed Subdivision* dated July 23, 2002:

- (i) Grass in swales and storm facility basins: Respondent must ensure that the block

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sod referenced on p. 7 of the Mitigation Plan be comprised of local native species.

(ii) Contingency Plan: Prior to proceeding with Option 3 (wetland bank or off-site mitigation) on p. 13 of the Mitigation Plan, Respondent must consult with EPA concerning an adaptive management strategy which may result in Respondent using other options or a combination of options to meet the performance standards referenced on p. 12 of the Mitigation Plan.

(iii) Invasive Species Control Plan: Respondent shall implement the invasive species control plan approved by EPA and appended to this Consent Order as Attachment 1a.

30. Respondent shall complete the work described in the Mitigation Plan. The Mitigation Plan is enforceable under this Order. The work shall be conducted in accordance with the following schedule:

DATE	TASK	COMMENT
By July 30, 2006	Lower the existing ground elevation on the 2.5-acre Mitigation Site. Identify the species of <i>Salix</i> to be planted. Such species must be suitable for this hydrology regime.	Planting will not commence until the Spring (March to May) following the completion of the excavation work to assure hydrology goals have been met before planting begins.
By May 31, 2007	Plant the buffer in Area A and wetland creation area as specified in the Mitigation Plan.	The signage referenced in the Mitigation Plan must be installed prior to planting.

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Beginning 30 days after the planting of the buffer and wetland creation areas is completed, but beginning no later than June 30, 2007, for a period of 10 years	Implement the EPA-approved invasive species control plan.	An active invasive plant eradication program shall be undertaken for the 10-year monitoring period. The plan for removal of invasive species may change as a better understanding of site conditions occurs over this period. Any changes to the plan must be approved by EPA prior to implementation.
Beginning 60 days after the planting of the buffer and wetland creation areas is completed, but beginning no later than June 30, 2007, for a period of 10 years	Annually assess the plants in the Mitigation Site and buffer in Area A for mortality as specified in the Mitigation Plan.	A report will be submitted to EPA each year on the status of the Mitigation Site and any additional planting conducted as a result of plant mortality.
At the end of the 10-year monitoring period, no later than June 30, 2017	Submit 10-year report to EPA.	If this report documents that the Mitigation Plan performance standards and goals are met, this will constitute the final report.

31. Notwithstanding any review, suggestions, or comments by EPA, the Corps, or other governmental entities, Respondent agrees to remain solely responsible for the full implementation of the Mitigation Plan and for achieving and maintaining full compliance with this Consent Order, the CWA, and any other applicable laws, regulations, and permits.

VIII. QUALIFICATIONS FOR IMPLEMENTING MITIGATION PLAN

32. All Mitigation Plan work shall be done under the supervision of persons with education, experience, and expertise deemed sufficient by EPA to conduct the work.

33. Respondent has notified EPA that it has selected the consultant listed in paragraph

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45 to supervise all Mitigation Plan work and to act as Project Coordinator for Respondent.

IX. PRESERVATION REQUIREMENTS

34. Respondent agrees to set aside and preserve the 2.5-acre Mitigation Site.

35. Within ninety (90) days of the effective date of the Consent Order, Respondent shall record a copy of this Consent Order with the Clark County Auditor, along with a fully executed Conservation Covenant that has been previously approved by EPA.

36. Proof of recording of the Consent Order and Conservation Covenant shall be sent to EPA at the address specified in paragraph 45 below. Thereafter, each deed, title, or other instrument conveying an interest in any part of the Mitigation Site shall contain a notice which states that the property is subject to the Conservation Covenant described in this Consent Order and which references the recorded location of this Order. Respondent shall bear all costs associated with the actions required by this paragraph.

37. The purpose of the Conservation Covenant is to assure that the 2.5 acres of wetlands created in the Mitigation Site will be retained in perpetuity in their natural open space condition and to prevent any use of these preserved wetlands that will significantly impair or interfere with their conservation functions and values. Respondent intends that the Conservation Covenant will limit the use of the preserved wetlands consistent with the conservation functions and values referenced above and limit the use of the preserved wetlands by its heirs, successors, and assigns in a similar manner.

38. Any activity on, or use of, the preserved wetlands inconsistent with the purpose of the Conservation Covenant is prohibited. Without limiting the generality of the foregoing, the

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following activities and uses are expressly prohibited:

- (i) Subdivision and residential development.
- (ii) Commercial, industrial, or agricultural development and/or use including, but not limited to, excavation for a farm pond and livestock grazing.
- (iii) Alteration of the land surface or any vegetation other than the removal of hazard trees or non-native invasive species.
- (iv) Mineral development.
- (v) Waste disposal.
- (vi) Timber harvest.
- (vii) Water rights removal.
- (viii) Activities which result in a change of wetland hydrology after the successful completion of the Mitigation Plan.

X. MODIFICATION OF CONSENT ORDER

39. EPA may make a preliminary determination that tasks in addition to those defined in the Mitigation Plan are necessary to accomplish the purposes of the Mitigation Plan as set forth in Section VII above. EPA shall notify Respondent of such a preliminary determination in writing and Respondent shall have seven (7) days from receipt to submit a written response.

40. Modification of this Consent Order, including specification of additional tasks not described in the Mitigation Plan, shall be in writing and shall take effect only when agreed to and signed by all the parties.

XI. PROGRESS MEETINGS AND REPORTS

41. Respondent shall meet or confer by phone with EPA at such reasonable times as

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EPA may request, during the initiation, conduct, and completion of the Mitigation Plan, to discuss any provision of the Mitigation Plan including, but not limited to, the technical aspects of the Mitigation Plan, and any anticipated problems or new issues. Meetings or conference calls will be scheduled at the mutual convenience of the parties. EPA and Respondent have the discretion to invite other federal, state, and local government agencies to participate in any of the meetings or conference calls.

XII ACCESS TO SITE AND DATA

42. At EPA's request, Respondent shall submit results or other data relevant to the Mitigation Plan within seven (7) days from receipt of the results or data by Respondent.
43. Respondent shall notify EPA at least five (5) days prior to conducting significant work events in preparation for or in accordance with the Mitigation Plan.
44. This Consent Order shall in no way affect EPA's authority to enter, inspect, sample, or monitor compliance under any law, permit, court order, or agreement and Respondent shall arrange for access by EPA or its authorized representatives, upon reasonable notice and at such times as may be mutually agreed by the parties, for determining compliance with this Consent Order until termination of this Order. For purposes of this Consent Order, EPA's authorized representatives shall include all EPA employees and contractors, Corps employees and contractors, and such other persons as EPA may designate.

XIII DESIGNATED PROJECT COORDINATORS

45. The parties have designate their respective Project Coordinators as follows:

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(i) For EPA:

Richard Clark
U.S. Environmental Protection Agency
1200 Sixth Ave., ECO-083
Seattle, WA 98101
(206) 553-6522 FAX (206) 553-1775
Clark.Richard@epa.gov

(ii) For Respondent:

Joe Sturtevant, P.E.
Sturtevant, Golemo & Associates, Inc.
2211 Main Street
Vancouver, Washington 98660
(360) 993-0911
joes@sgaengineering.com

46. The Project Coordinators shall be responsible for overseeing the implementation of this Consent Order and receiving communications, which include, but are not limited to, all documents, reports, comments, approvals, and other correspondence submitted or exchanged under this Consent Order.

47. EPA and Respondent may change their respective Project Coordinator by giving the other party advance written notice.

48. Respondent's Project Coordinator may assign a representative, or alternate Project Coordinator, including a contractor, to serve as Respondent's site representative for oversight of completion of the Mitigation Plan.

XIV. RECORD PRESERVATION

49. Respondent shall preserve and retain, and shall instruct its consultant, and any other person acting on its behalf, to preserve and retain all records and documents that relate in

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any manner to the Mitigation Plan for three (3) years after termination of this Consent Order. Upon termination of the three-year period, EPA may request Respondent to provide EPA with copies of any records and documents subject hereto. If EPA requests that copies of the records and documents be provided to EPA, Respondent shall, at no cost to EPA, subject to applicable attorney-client or other privilege, give EPA the documents or copies of the documents. If EPA makes no request at the end of the three-year period, Respondent may dispose of the records or documents.

XV. DELAY OF PERFORMANCE/FORCE MAJEURE

50. "Force majeure," for purposes of this Consent Order, is any event entirely beyond the control of Respondent or any entity controlled by Respondent, including its contractors, consultants, and subcontractors, that delays or prevents performance of any obligation under this Consent Order notwithstanding Respondent's best efforts to avoid the delay. The best efforts requirement includes using best efforts to anticipate any such event and minimize the delay caused by any such event to the greatest extent practicable. Examples of events that are not force majeure events include, but are not limited to, increased costs or expenses of any work to be performed under this Consent Order and financial or business difficulties of Respondent.

51. If any event may occur or has occurred that may delay the performance of any obligation under this Consent Order, whether or not caused by a force majeure, Respondent shall notify by telephone the EPA Project Coordinator or, in his absence, the manager of the Aquatic Resources Unit, EPA Region 10, within two (2) business days of when Respondent became aware that the event might cause a delay. Within seven (7) days thereafter, Respondent shall provide in writing the reasons for the delay, the anticipated duration of the delay, the measures

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taken or to be taken to prevent or minimize the delay, a timetable by which those measures will be implemented, and whether, in Respondent's opinion, such event may cause or contribute to an endangerment to public health, welfare, or the environment. Respondent shall exercise its best efforts to avoid or minimize any delay and any effects of a delay. Failure to comply with the notice requirements of this paragraph shall preclude Respondent from asserting any claim of force majeure.

52. In the event that there is an actual or anticipated delay attributable to force majeure, the time for performance of the obligation shall be extended by written agreement of the parties. An extension of the time for performing an obligation directly affected by the force majeure event shall not, of itself, extend the time for performing a subsequent obligation.

53. Respondent shall have the burden of demonstrating, by a preponderance of the evidence, that the actual or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay was or will be warranted under the circumstances, that Respondent did exercise or is using its best efforts to avoid and mitigate the effects of the delay, and that Respondent complied with the requirements of this section.

XVI. FAILURE TO COMPLY WITH CONSENT ORDER

54. EPA reserves all available legal and equitable remedies to enforce this Consent Order.

55. Failure to comply with Sections VI and VII of this Consent Order is a violation of the CWA. Such violation may subject Respondent to an action for injunctive relief under Section 309(b) of the CWA, 33 U.S.C. § 1319(b), and/or civil penalties not to exceed \$32,500 per day for each violation under Section 309(d) of the CWA, 33 U.S.C. § 1319(d), and 40 C.F.R.

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Part 19. In addition, a negligent violation is punishable by a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or imprisonment for not more than one year, or by both, 33 U.S.C. § 1319(c)(1); a knowing violation is punishable by a fine of not less than \$5,000 nor more than \$50,000 per day of violation, or imprisonment for not more than three years, or by both. 33 U.S.C. § 1319(c)(2).

XVII. SCOPE OF CONSENT ORDER

56. This Consent Order is not and shall not be construed to be a permit under the CWA, nor shall it in any way relieve or affect Respondent's obligations under the CWA, or any other applicable federal, state or local laws, regulations, or permits; provided, however, Respondent's compliance with the Mitigation Plan shall be considered to be authorized under the CWA. Compliance with this Consent Order shall be no defense to any actions commenced pursuant to such applicable laws, regulations, or permits.

57. This Consent Order shall not be construed to pre-empt or preclude in any way any future administrative order issued by EPA or judicial action brought by the United States regarding environmental impacts not addressed by this Consent Order. This Consent Order shall not be construed to resolve any claims for administrative penalties or civil penalties that may be assessed or sought by EPA or the United States, including penalties for unauthorized activities whose impacts are either partially or fully addressed in this Consent Order. Respondent waives all rights to argue in any future administrative or judicial forum that this Consent Order constitutes an election of remedies by EPA or the United States, or that this Consent Order limits or precludes in any way any additional restoration, removal, administrative penalties, judicial penalties, or other relief, whether sought by EPA administrative order or judicial action brought

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by the United States, for violations of the CWA or any other statute, regulation, or permit.

58. This Consent Order shall in no way affect the rights of EPA or the United States against any person not a party hereto.

59. Nothing in this Consent Order shall be deemed to constitute a precedent by any party for any future administrative order, consent decree, or civil action relating to the Site and/or restoration work that may be undertaken pursuant thereto.

60. Respondent represents that it is duly authorized to execute this Consent Order and that the party signing this Consent Order on its behalf is duly authorized to bind Respondent to the terms of this Consent Order.

XVIII. SEVERABILITY

61. The provisions of this Consent Order shall be severable. Should any provision be declared by a court of competent jurisdiction to be unenforceable, the remaining provisions shall remain in full force and effect.

XIX. TERMINATION AND SATISFACTION

62. Respondent shall submit yearly reports to EPA on the condition of the mitigation site and actions taken by Respondent to meet the success goals outlined in the Mitigation Plan starting 60 days after completing the planting of the buffer in Area A and wetland creation areas for a period of ten (10) years. With the yearly reports, Respondent shall also submit photographs from permanently fixed, identified locations documenting the condition of the Mitigation Site and work that has been completed at the Mitigation Site.

63. At the end of the 10-year monitoring period, Respondent shall submit to EPA a report documenting the completion of all requirements described in the Mitigation Plan including

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attainment of the goal of achieving 75% plant coverage of the Mitigation Site and 80% plant survivorship.

64. Upon receipt of the 10-year report referenced above, EPA will schedule as promptly as possible with Respondent an inspection of the Site by EPA and the Corps.

65. After submission of the 10-year report and inspection of the Site by EPA and the Corps, EPA will notify Respondent in writing as to whether the Mitigation Plan has been satisfactorily completed or whether any additional tasks must be completed in accordance with Section X above and the contingency plan contained in the Mitigation Plan.

66. This Consent Order shall terminate when EPA notifies Respondent in writing that the Mitigation Plan has been satisfactorily completed.

XX. EFFECTIVE DATE

67. Respondent has had the opportunity to consult with EPA concerning this Consent Order as provided in Section 309(a)(4), 33 U.S.C. § 1319(a)(4). This Consent Order shall therefore take effect upon signature by all parties.

IT IS SO AGREED AND ORDERED:

For UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 10

Dated: 9/15/05

Michelle Pirzadeh, Director
Office of Ecosystems, Tribal and Public Affairs

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For RESPONDENT
LANDMARK DEVELOPMENT, LLC

Dated: _____

9/12/05

Corey D. Harris, Principal/Managing Member
Landmark Development, LLC

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